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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

File: WAC 01 283 50835 Office: California Service Center Date: MAR 04 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a gas station/mini mart. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor, and continuing. Here, the petition's priority date is October 23, 1997. The beneficiary's salary as stated on the labor certification is $21.51 per hour or $44,740.80 per annum.

The petitioner submitted copies of its owner's 1997 through 2001 Form 1040 U.S. Individual Income Tax Returns. The returns showed adjusted gross income of $45,482 for 1997, -$28,298 for 1998, $47,671 for 1999, $78,387 for 2000, and $93,733 for 2001.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition accordingly. The director confined his analysis to the 1997 and 1998 tax returns, concluding that the petitioner could not have paid the proffered wage and supported his family in 1997, and could not have paid the proffered wage in 1998.

On appeal, counsel asserts that CIS should consider the petitioner's entire financial picture when determining the ability to pay. Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *O'Conner v. U.S.*, 1987 WL 18243 (D. Mass. 1987) to support his assertion.

Counsel's argument is not persuasive. *Matter of Sonegawa, supra,* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. Counsel has provided no evidence which establishes that unusual circumstances exist in this case which parallel those in *Sonegawa*.

In *O'Connor v. U.S., supra,* the court saw a parallel with *Sonegawa,* but its primary focus was on the personal assets of the owners of the petitioning entity. In the instant case, there is no evidence that the owner could have met the proffered wage by using or liquidating any of his own personal assets. Furthermore, the published decisions of district courts are not binding on CIS outside of that particular proceeding. *See Matter of K-S-,* 20 I&N Dec. 715 (BIA 1993).

In his decision denying the petition, the director referred to an undated statement of monthly expenses for the petitioner's owner. That statement which is in the record shows expenses of $3,344.00 a month, or $40,128.00 a year. The AAO notes that the petitioner's owner claimed four tax exemptions from 1997 through 2000, and eight exemptions in 2001. With yearly expenses of $40,128.00, the owner would only have had sufficient available funds to pay the proffered wage in 2001. Even in that year, with seven dependents other than himself to support, it is doubtful that the owner could have paid the proffered wage and supported that many dependents.

Accordingly, after a review of the evidence submitted, it is

concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.